No. 4061

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY OF KETCHIKAN (a municipal corporation),

Appellant,

vs.

MARY M. FURNIVALL,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions this court for a rehearing, and begs leave to submit the following:

I.

LACK OF ORDINANCE. WAIVER OF OBJECTION.

The affirmance by this court of the decree of the court below was stated to be on the ground that the record showed that there had been no ordinance or resolution authorizing the improvement and special assessment.

Conceding that the lack of an ordinance or resolution would have been sufficient reason for the lower

court to quash the assessment, if such lack of ordinance had been one of the written objections filed; yet, there being no such objection filed, we maintain that the lack of an ordinance could not be considered— it was outside the issues— it was waived. We raised this point in the original brief (p. 13 and p. 15 (d)).

The power of the City to make special assessments on abutting owners to pay the cost of improvements is conferred by Section 627 C. L. A. 1913, and "hangs on an If", but that "If" was the only condition imposed— it is the only jurisdictional requirement. There was no showing that that requirement did not obtain. Under the statute it is presumed to have obtained, there being no evidence to the contrary (4 Alaska 366). The lower court made no finding on the subject.

The passage of an ordinance or resolution is a means by which the power conferred may be put into effect, but it does not affect the existence of the power. It is not "constitutional" or jurisdictional in the sense that it could not be waived, and the legislature has plenary power to say how, in what manner and to what extent the property owner may be heard in opposition to a special assessment which a City is given the power to make, and which does not trench upon constitutional rights. This assessment did not trench upon any constitutional rights. The objector had his "day in court" before the assessment could be made effectual—full opportunity to urge the objection of no ordinance—but he failed to avail himself of that opportunity.

> "It is within the power of the legislature to declare what steps shall be taken, and, having this power, it necessarily follows that it may provide that parties, by failing to object, shall be held to have waived objections. If there is power to prescribe the acts that shall be done, there is also power to declare when the performance of such acts shall be dispensed with or when the party shall be held estopped to aver that they have not been performed * * * if the legislature may authorize the letting of contracts without advertising for proposals it may declare that an objection that there was no notice shall be unavailing, unless made before a designated time and in a specified manner. * * * It does no more in declaring an estoppel or waiver than it might have done in the first instance." 2 Elliott on Roads and Streets, Sec. 738, 3rd Ed.

In Bass v. City of Casper, 205 p. 1008, it is said on p. 1013, middle 2nd column:

> "Whatever the legislature could have dispensed with in the first place it has power, as we have seen, to declare waived, or the defects therein cured, unless objections are filed as provided by law, citing cases."

And at a former hearing of same case, speaking of a waiver statute, the court said:

> "That section is in fact so broad and sweeping in its provisions, that *it is clear that defects in all jurisdictional steps which depend on the statute merely, and involve no constitutional rights are, in the absence of objections, filed as provided by law,* when and after opportunity for the filing of such objections has been given and has existed, declared *irregularities merely,* and must be so held at least where there has

> been an attempt in good faith to follow the provisions of the law. * * * The only question therefore remaining is whether or not some constitutional guaranties have been violated." (Idem. 205, p. 443, 2nd col. bottom.)

In that case there was an express provision that objections not made were to be considered as waived. There is no specific provision to that effect in the Alaska Statute, but it necessarily implied, as we shall show.

In the well considered case of City of Birmingham v. Wills, 59 So. 173-177, bottom, it was said:

> "The preliminary notice, and all those other steps preliminary to the notice of the assessment and the assessment itself, about the absence or perversion of which the bill complains, are provisions of legislative grace. Being written in the statute, they must be observed or the property owner may at the final hearing have the benefit of the omission of *such* of them as may be considered essential *where there has been no waiver. But their omission may be waived.* * * * *Jurisdiction of the subject matter is conferred by the statute. Jurisdiction of the property and its owner in each case is prepared by the passage of preliminary resolutions or ordinances,* and by all those essential steps required to be taken prior to the time when the proceeding takes on a judicial aspect. But in taking these steps the council exercises a business or administrative power. The effect of the statute is to make material defects or omissions in them just cause for an abatement of the proceeding, *but its intention is to destroy all distinctions between defects or omissions and mere errors and irregularities in the preparatory steps in those cases in which the*

owners, after due notice and an opportunity to present every defense, remains silent and inactive."

"Since the legislature might have dispensed with any estimate, the failure of the council to make any would doubtless be held an irregularity which might be waived by a failure to protest." Collins v. Ellensburg, 68 Wash. 212, 122 p. 1010.

Alaska Statute:

The Alaska Statute provides that

"Such objections shall be *in writing and specify the grounds of objection* to the assessment or tax on the particular tract represented in *such objection,* and the court will hear and determine *such objection* and render such decision *thereon* as may be legal and just, etc." Ch. 69 p. 257, Session Laws, Alaska, 1913).

This is in effect a declaration that objections not so made are waived, provided, of course, that the City had jurisdiction over the subject matter, i. e., over the levying of special assessments.

On this point it is said in Section 920 of 2 Page and Jones on Taxation by Assessment:

"The issues which may be heard and determined at confirmation are controlled by statute. As long as the constitutional rights of the property owners are not violated, *it rests with the legislature* to say to what extent they may be heard in opposition to the assessment. Accordingly, the rights of the property owner are limited to the issues provided for by statute, and a hearing cannot be had upon issues not so provided for."

The same author says, in Section 917, p. 1556:

> "The objections must, however, show the point upon which the action of the court is invoked, and must so state it as to enable the adversary party to obviate the objection, if possible."

And in Section 918, p. 1558, he says:

> "Under statutes which provide for filing objections and for a hearing upon the questions thus raised, the intention of the legislature is to provide a prompt and speedy method of determining the *validity* of the assessment and the proceedings leading up thereto; under many of the statutes an opportunity is thus presented to determine the validity of the proceedings before any expense has been incurred for the public improvements for which it sought to levy the assessment. Under such statutes, accordingly, a failure to file objections operates as a waiver of all which can in law be waived, and if such objections are not interposed at the proper time they cannot be interposed subsequently.
>
> "* * * If the property owners make default and fail to file objections confirmation is said to follow as a matter of course. * * * On the same principle, filing objections in which certain defects are pointed out operates as a waiver to *all* other defects to which such objections could have been interposed. * * * Objections which do not raise questions of jurisdiction are waived by filing objections in which such defects are not specified. * * * Thus, where the trial court before which a large number of objections had been filed required the property owner to point out specifically on what objections he relied, and he did so, other objections will be regarded as waived."
>
> "The evidence offered at confirmation must tend to substantiate the respective claims, and if offered by the property owners must tend to

> show the invalidity of the assessment with respect to one or more of the questions which can be considered at the confirmation." Idem. Sec. 922.
>
> "But they (objections) must be good and sufficiently specific. The issues to be determined on confirmation are usually limited to those provided for by statute." Elliott on Roads and Streets. Sec. 567, p. 117.

Section 628, C. L. A. 1913, provides that

> "No ordinance or resolution shall be valid unless adopted by a vote of *four* members of the council at a meeting where not less than *five* members are present."

Surely, an objection that only *three* members voted for the ordinance or that only *four* members were present, would be waived if not embodied in the written objections, and yet the invalidity would be as cogent in the one case as in the other. In both cases there would have been "no ordinance".

In City of Marengo, Eichler 91 N. E. 758-9, the court said:

> "None of the objections put in issue the fact that the ordinance had been passed, and it was therefore unnecessary to prove it."

In City of Chicago v. Wells, 113 N. E. 695, the question was on the proper *publication* of an ordinance. The court said:

> "The question of such publication did not go to the jurisdiction of the court as to the subject matter and could, therefore, be waived. * * * Objections *not urged* and proven are considered waived" (p. 696).

The case of Stewart v. City of Detroit, 100 N. W. 613 (Mich.), goes so far as to hold that the failure to assign the absence or insufficiency of a *petition* will preclude the objector from urging that as a reason for setting aside the assessment.

As the objection of lack of an ordinance was not one of the objections specified—was not an issue—the City was not called on to meet such objection. The lower court had jurisdiction to pass upon only "*such*" objection, i. e., upon an objection made in writing.

II.

In its opinion this court said, also:

> "Furthermore, under the Alaska Statute the discretion to levy a tax upon abutting property to pay two-thirds of the cost of an improvement must be exercised when the petition for the improvement is heard and before, or at the time, the improvement is ordered."

We submit that the statute is silent on the subject of when the discretion is to be exercised and that no such objection was specified in the written objections.

Dated, San Francisco,
January 9, 1924.

Respectfully submitted,
A. H. Ziegler,
Robert W. Jennings,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.

Dated, San Francisco,
January 9, 1924.

ROBERT W. JENNINGS,
Attorney for Appellant and Petitioner.